

“TENURE RIGHTS” OF CERTIFIED EMPLOYEES
Wells and Rice v. Dep’t of Higher Education
State Personnel Board Case No. 2002B092(C)

An administrative law judge (ALJ) for the State Personnel Board recently issued an initial decision that reversed a hiring decision when Auraria Higher Education Center (AHEC) took over a function that had previously been performed by the University of Colorado-Denver (UCD). UCD eliminated its Media Center and abolished approximately 25 FTEs. AHEC took over the Media Center functions and, as a cost-cutting measure, reduced the staffing to approximately 14 FTEs. The ALJ held that AHEC violated the tenure rights of a more-senior employee when it hired less-senior employees.

The Colorado Constitution, art. XII, § 13(8), states that “[p]ersons in the personnel system of the state shall hold their respective positions during efficient service or until reaching retirement age, as provided by law.” The Colorado courts have interpreted this provision to provide “tenure rights” to certified employees. The first case that recognized “tenure rights” was *People ex rel. Kelly v. Milliken*, 74 Colo. 456, 223 P.40 (1923). The legislature abolished a program, then created new positions with substantially the same duties. The Court stated, “Since their tenure of office is secured to them by the Constitution, the so-called civil service amendment (article 12, § 13), the Legislature has no power to deprive them of it. That body has, indeed, the power to abolish the office, but it may not avoid the Constitution by abolishing the office and creating a new one with duties substantially the same, to which new officers are appointed.” 223 P. at 457. The court held that the old employees were entitled to be rehired if the new jobs were filled.

Bardsley v. Dep’t of Public Safety, 870 P.2d 641 (Colo. App. 1994), involved the elimination of the Department of Public Safety’s Division of Disaster Emergency Services (DODES) and the creation of an Office of Emergency Management (OEM) in the Department of Local Affairs (DOLA) as part of a budget reduction plan. DODES was staffed by 31 FTEs, and all the associated employees were laid off by DPS. OEM was staffed by 20 FTEs, some of which required substantially the same qualifications and performed substantially the same duties as DODES positions. None of the DODES employees was transferred to OEM, but several were offered positions as new employees.

The *Bardsley* court disapproved this action:

[O]ur supreme court, for more than 70 years, has made clear that neither the executive branch nor the legislature can deny to certified state employees the tenure rights granted to them by the Civil Service Amendment. Hence, a certified position may not be abolished and the incumbent employee terminated if a new position is created with substantially the same duties and responsibilities as the old position, but filled by another employee.

870 P.2d at 647. The court reviewed other cases and concluded “that the rights granted by the Civil Service Amendment to a certified state employee include the right not to be displaced by the abolition of the position occupied and the creation of a new position which is required to perform *substantially* the same service.” *Id.* at 648. Therefore, if any of the 20 new positions in OEM substantially duplicated the qualifications and duties of any of the old DODES positions, “the former DODES employees were entitled to be transferred to those new positions without any loss of their previously vested benefits.” *Id.*

This issue was presented recently in *Wells and Rice v. Dep’t of Higher Education*. UCD had operated the Media Center that served all the institutions located on the Auraria Campus. At the end of 2001, the institutions decided to transfer all the Media Center functions to AHEC, which reduced the staffing from 27 to 15 FTEs. The Media Center employees were given an opportunity to exercise retention rights within UCD and to transfer to AHEC. AHEC requested copies of the applicants’ performance evaluations, but did not review their personnel files and did not consider seniority in its hiring decisions.

A number of UCD employees appealed; all but two resolved their appeal issues prior to hearing. The ALJ resolved the cases in favor of UCD. Complainant Wells did not apply for a transfer to AHEC, so the ALJ found that AHEC did not violate his rights. However, the ALJ ruled that AHEC should have offered complainant Rice a position.

Rice had over three years’ experience in his classification. AHEC hired two Media Center employees who had approximately two years’ experience in the same classification. The two employees AHEC hired had some qualifications that Rice lacked, but those qualifications were not required in the job announcement or PDQs for the positions.

The ALJ applied *Bardsley* after finding that the AHEC positions were substantially similar to the position that Rice and other UCD employees had held; the only difference was that there were fewer positions at AHEC than there had been at UCD. The ALJ stated,

While the Board layoff rules and state statutes do not provide for the specific circumstances of this action (transfer of an entity from one retention area to another), they do, when viewed in light of constitutional provisions and the *Bardsley* case, provide guidance. A common theme throughout the Colorado constitution, state statutes, Board rules and the *Bardsley* case is a recognition of certified state employees’ tenure rights and a protection of those rights. Tenure rights are a broader concept than the retention rights encompassed by Board rule. Retention rights are rights, based upon seniority, within a retention area. Board Rules, R-7-7 through R-7-20, 4 CCR 801.

Tenure rights are rights, based on seniority, throughout the state personnel system.

The ALJ concluded that AHEC had violated Rice's tenure rights when it hired two less-senior UCD employees into the positions. She ordered AHEC to appoint Rice to one of those positions and pay him back pay and benefits. This case is currently on appeal to the full State Personnel Board.

When functions are transferred from one department or institution to another, *Bardsley* requires the receiving department to transfer employees who had performed those functions to new positions that substantially duplicate their former positions. The employees thus have rights beyond their retention rights, which only exist within the sending department. However, *Bardsley* did not address how a receiving department should act when it has fewer positions to fill than employees who wish to transfer.

Milliken and *Bardsley* state that the employees' rights to be rehired into or to transfer to the new positions are an aspect of their constitutional tenure rights. The Board has defined "tenure" as the "[c]ombination of rights which vest in a certified employee by virtue of certified status, seniority, and years of service." Board Rule R-12-28. The ALJ concluded that tenure rights require the receiving department to consider seniority and other factors identified in the state constitution, statutes, and Board rules in deciding which employees to hire. Those additional factors include the qualifications required for the position and the employees' performance evaluations.

In cases such as this, where the receiving department is filling fewer positions than there are employees, the receiving department should first consider whether the applicants meet the qualifications specified for the positions. The receiving department can review its business needs, including those that result from the reduction in the number of positions, when it determines the necessary qualifications. If the number of qualified potential transferees exceeds the number of available positions, the receiving department should consider their seniority and performance evaluations in its hiring decisions. This consideration will be similar to that involved in administering a layoff and retention rights.